INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute and regulations involved	2
Statement	4
Argument	8
Conclusion	14

CITATIONS

Cases:

Barnum v. *Commissioner*, 19 T.C. 401	13
Cox v. *Commissioner*, 176 F. 2d 226	11, 12
Dauwalter v. *Commissioner*, 9 T.C. 580	12
Eisinger v. *Commissioner*, 250 F. 2d 303, certiorari denied, 356 U.S. 913	7
Feinberg v. *Commissioner*, 198 F. 2d 260	10
Holahan v. *Commissioner*, 21 T.C. 451, affirmed, 222 F. 2d 82	7, 13
Hollander v. *Commissioner*, 248 F. 2d 523	10, 11
Lerner v. *Commissioner*, 195 F. 2d 296	10
Newton v. *Pedrick*, 115 F. Supp. 368, affirmed, 212 F. 2d 357	7, 10, 11
Newton v. *United States*, 163 F. Supp. 614	7
Smith v. *Commissioner*, 192 F. 2d 841	10
Walsh v. *Commissioner*, 11 T.C. 1093, affirmed, 183 F. 2d 803	13
Walsh v. *Commissioner*, 21 T.C. 1063	10, 13

Statutes:

Internal Revenue Code of 1939:	
Sec. 22(k) (26 U.S.C. 1952 ed., Sec. 22(k))	2, 7, 8, 9, 10, 11, 12, 13
Sec. 23(u) (26 U.S.C. 1952 ed., Sec. 23(u))	7

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., p. 9, and pp. A20–A21 (3 U.S.C. Cong. & Admn. News (1954) 4017, 4157)	13
Treasury Regulations 111, Sec. 29.22(k)–1	2, 8

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 177

ALICE L. HEATH, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 5a–17a) are reported at 30 T. C. 339. The *per curiam* opinion of the court of appeals (R. 19a–20a) is reported at 265 F. 2d 662.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1959 (R. 21a). The petition for a writ of certiorari was filed on July 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Petitioner's former husband made payments to her of $11,000 a year during 1943, 1944, and 1945 pursu-

ant to a property agreement executed six years after their divorce which modified the original arrangements made before and at the time of the divorce. The question here is whether the court below correctly affirmed the Tax Court's decision that these payments were includible in petitioner's gross income under Section 22(k) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> * * * * *
>
> (k) [As added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 816] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, * * *.
>
> * * * * *
>
> (26 U.S.C. 1952 ed., Sec. 22)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former*

Wife.—(a) In general.—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharging of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

* * * * *

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

Petitioner and Maurice Newton were married in August 1917. On July 23, 1924, while domiciled in France, they entered, in anticipation of divorce, into a trust agreement providing for the support of petitioner and their two minor children. Under that agreement Newton conveyed to trustees $400,000 of his capital contribution in a New York partnership with directions to the trustees to use the income as follows (R. 6a):

> * * * to apply and pay over from time to time but not less often than quarterly, the net income and interest to the use of the Third Party [the petitioner] until the death or remarriage of said Third Party.

In the event of the remarriage of the petitioner, she was to receive the income of one-half of the trust corpus for life. It was the plan of the parties to the trust agreement that the petitioner should receive $24,000 annually until her death or remarriage, and upon remarriage $14,000 for herself and $5,000 for each child annually (R. 6a–7a).

On July 28, 1924, five days after the execution of the trust instrument, the petitioner and Newton were divorced by a decree issued by a French court whose jurisdiction is not questioned. The decree granted custody of the children to the petitioner, but made no reference to the trust agreement, and made no provision for alimony (R. 7a).

Petitioner married Mr. Heath in 1926. On May 18, 1928, petitioner and Newton entered into a custody agreement which provided that custody of the children should be divided between petitioner and Newton. At the same time they also entered into a property agreement which provided that Newton should be the guardian of the property of the children and entitled to receive the income which under the 1924 trust agreement was payable to petitioner on behalf of the children. In the agreement Newton undertook to pay petitioner $6,000 annually for life in addition to the amounts required by the 1924 trust agreement, conditioned on petitioner's faithful performance of the custody agreement. Newton further agreed to pay petitioner during the minority of the children $1,250 annually for the maintenance and support of each child in the period that petitioner was entitled to their custody and an additional $2,500 each year in which the children remained during the summer months in the United States at stipulated places. The property agreement was not to become effective until the contemporaneous custody agreement was approved by the Surrogate's Court of the County of New York. That court approved the custody agreement on May 22, 1928 (R. 7a–8a).

On September 22, 1930, petitioner and Newton entered into new custody and property agreements. Under the custody agreement Newton became the sole guardian of the children and was given exclusive custody of them with visitation rights in petitioner. The effect of the agreement was to continue Newton

as the guardian of the property of the children. The 1930 property agreement provided for the cancellation of the 1928 property agreement but left the 1924 trust agreement undisturbed. Under the 1930 property agreement Newton was required to pay to petitioner $11,000 annually in addition to amounts receivable by her under the 1924 trust agreement. The $11,000 annual additional payments were terminable at the option of Newton in the event petitioner should apply to any court for modification or revocation of the 1930 agreement. The 1930 property agreement was not to become effective until the 1930 custody agreement had been approved by the Surrogate's Court of New York County. The approval of that court was duly obtained (R. 8a).

By the end of 1932, the entire corpus of the trust created by Newton in 1924 had been lost and no income from it was available to be paid to petitioner. In 1937, following litigation between petitioner and representatives of the original trustees of the 1924 trust, these representatives established a new trust fund from which petitioner has received payments which she has reported on her income tax returns (R. 8a).

Petitioner did not include in income the $11,000 received by her from Newton in each of the years 1943, 1944, and 1945 under the 1930 property agreement. The Commissioner has included such amount in petitioner's income for each year as alimony income (R. 9a).

For the year 1944 Newton brought suit against the Collector of Internal Revenue for the Second

District of New York for refund of income tax. The question for determination in that case was whether the amount of $11,000 paid by Newton to the petitioner in 1944, pursuant to the 1930 property agreement should have been allowed as an item of alimony deductible under Section 23(u) of the Internal Revenue Code of 1939, as defined by Section 22(k) of the Code.[1] The district court entered judgment for the Collector. *Newton* v. *Pedrick*, 115 F. Supp. 368. The Court of Appeals for the Second Circuit, in *Newton* v. *Pedrick*, 212 F. 2d 357, reversed the district court and held the payments to be deductible by Newton (R. 9a).

At the time this case was tried, a case brought by Newton against the United States was pending in the Court of Claims for recovery of the income tax upon the sum of $11,000 that he paid to petitioner in the year 1945. The only defense made by the United States against recovery was the bar of the statute of limitations (R. 9a). The Court of Claims has recently held that the husband could have the benefit of the deduction. *Newton* v. *United States*, 163 F. Supp. 614.

In the instant case, the Tax Court concluded that the $11,000 received by petitioner from Newton in each of the taxable years involved under the 1930

[1] Section 23(u) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 23) provides that only amounts which are includible in the wife's gross income under Section 22(k) are deductible by the husband. See *Eisinger* v. *Commissioner*, 250 F. 2d 303 (C.A. 9), certiorari denied, 356 U.S. 913; *Holahan* v. *Commissioner*, 21 T.C. 451, affirmed, 222 F. 2d 82 (C.A. 2).

property agreement was a payment in discharge of a legal obligation of Newton which was incurred by him under a written instrument incident to the divorce of petitioner and Newton (R. 9a). Accordingly, the Tax Court sustained the Commissioner's determination that the $11,000 was includible in petitioner's gross income as alimony income under Section 22(k) of the Internal Revenue Code of 1939 (R. 15a–16a). The Court of Appeals for the Second Circuit affirmed *per curiam* on the findings of fact and opinion of the Tax Court (R. 20a).

ARGUMENT

1. Petitioner claims that under Section 22(k) of the Internal Revenue Code of 1939 (*supra*, p. 2) and Treasury Regulations 111, Section 29.22(k)–1 (*supra*, pp. 2–3), interpreting that section, periodic payments made by a husband to his wife in discharge of a legal obligation, arising out of a marital relationship, need be included in her gross income only if the obligation was incurred by him under a divorce decree or a written instrument incident to such *divorce decree*. It is clear, however, that both the statute and regulations require that such payments must be included in the wife's gross income whenever paid in discharge of a legal obligation incurred by the husband *either* under a divorce decree *or* a written instrument incident to such *divorce*. Thus, Section 22(k) unmistakably provides that the payments are taxable to the wife whenever the obligation is "imposed upon or incurred by such husband under such [divorce] decree or under a written instrument incident to such divorce or separation * * *." And the Regulations state that:

> The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:
>
> (1) A court order or decree divorcing or legally separating the husband and wife, or
>
> (2) A written instrument incident to such divorce or legal separation.[6]

The argument in the petition for certiorari reflects a misunderstanding of Section 22(k). Petitioner has confused (Pet. 8, 17–20) the concept of "incident to such divorce" as used in Section 22(k) with the separate requirement, imposed by that Section, of a court decree establishing the divorce. The former denotes a relationship between the divorce and the instrument requiring payments; whereas, the latter emphasizes the necessity of a court decree evidencing the fact of the divorce regardless of the manner or connection of any payments arising out of the divorce. Here there is no doubt, not only that petitioner and her husband were divorced by judicial decree, but that the 1930 property agreement significantly modified the pre-divorce financial arrangements and the custody provisions of the divorce decree itself.[7]

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[6] It is interesting to note that, in support of her claim that the Regulations require that the obligation be incident to the divorce decree (Pet. 9–11), petitioner omits, in quoting from the Regulations (Pet. 9–10), the sentence: "It [Section 22(k)] will apply, however, if she received such interest from her husband in contemplation of or as an *incident to the divorce or separation* without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations. * * *" [Emphasis added.]

[7] Petitioner also confuses the meaning of "incident to such divorce" in arguing (Pet. 15, 20) that such a relationship is impossible when the post-divorce agreement is entered into after

2. Petitioner admits (Pet. 22) that the courts of appeals have held that pre-divorce agreements not incorporated or even mentioned in the divorce decree are nevertheless "incident to such divorce." See, *e.g., Lerner* v. *Commissioner*, 195 F. 2d 296 (C.A. 2); *Feinberg* v. *Commissioner*, 198 F. 2d 260 (C.A. 3). And it has also been held that post-divorce agreements, modifying pre-divorce agreements incorporated in the divorce decree, are incident to the divorce. *Smith* v. *Commissioner*, 192 F. 2d 841 (C.A. 1). In deciding that payments made pursuant to such agreements are taxable to the wife under Section 22(k), these cases implicitly hold that, while "incident to such divorce" means that there must be a relationship between the obligation to pay and the divorce, this obligation need not be incident to the divorce decree itself. Therefore, the Court of Appeals for the Second Circuit, after considering these cases, stated in *Newton* v. *Pedrick*, *supra*, 212 F. 2d at 361: "All this being so, we see no sound reason why an 'unincorporated' agreement which is incident to a divorce, and which otherwise meets the requirements of the statute, cannot be modified by a subsequent 'unincorporated' agreement."

In *Newton* v. *Pedrick*, the court of appeals held, in a case involving the deductibility of amounts paid by petitioner's former husband under this same 1930

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one or both of the parties remarries. Whether a party remarries does not of itself prevent a post-divorce agreement from being "incident to such divorce" as that phrase is used in Section 22(k), since the statute contemplates the status of divorce *inter se*. See *Newton* v. *Pedrick*, *supra*, 212 F. 2d 357 (C.A. 2); *Hollander* v. *Commissioner*, 248 F. 2d 523 (C.A. 9); *Walsh* v. *Commissioner*, 21 T. C. 1063.

agreement (see *supra*, pp. 6–7), that "incident to such divorce" as used in Section 22(k) did not mean incident to the divorce decree and, hence, did not exclude subsequent rearrangements of the divorce settlement (*id.* at 361):

> There is nothing in the statute or its legislative background which suggests that it was intended that the equitable distribution of the tax burdens resulting from the adjustment of marital or family financial obligations in connection with a dissolution of the marriage relationship, which the statute aimed to achieve, should be limited to those arrangements effected at the time of a decree of divorce or separation, without regard to their possible future rearrangement in consequence of later and perhaps unforeseen vicissitudes.

The court therefore decided that the $11,000 payment for 1944 was deductible by the husband. Accord, *Hollander* v. *Commissioner*, *supra*, 248 F. 2d 523 (C.A. 9). In the present case, the Second Circuit adhered to its decision in the *Newton* case by concluding that the $11,000 payments for 1943, 1944, and 1945 were includible in petitioner's income since the amounts were paid pursuant to the same agreement which was involved in the *Newton* case and there were no changes in the circumstances requiring a different treatment of the amounts with respect to petitioner-wife.

3. It is apparent that the decision below is not in conflict with the decision in *Cox* v. *Commissioner*, 176 F. 2d 226 (C.A. 3). In the *Cox* case, there was no pre-divorce agreement, the divorce decree did not impose an obligation upon the husband to pay

alimony, and the support agreement in controversy was entered eight months after the divorce. The Third Circuit therefore stated (*id.* at 229):

> It is to be observed, therefore, that while the Congress sought to apportion on terms the tax burden between the spouses, it had no intention to allow to married couples indiscriminate leeway in the adjustment of their differences insofar as such differences would have a tax consequence.
>
> * * * * *
>
> For the purposes of this case, we do not regard it as essential to determine the boundaries of the phrase "incident to such divorce". We think it sufficient to say that Section 22(k) envisages a situation in which the agreement between the husband and wife is part of the package of the divorce. * * *
>
> Under the facts of the case at bar, we hold that the written instrument does not come within that standard.

The clear distinction between the *Cox* case and the present case is that in *Cox* the support agreement was completely independent of the divorce settlement and the divorce decree. The Third Circuit, therefore, decided that the support agreement was not "incident to such divorce" as Section 22(k) required. Here, on the other hand, the 1930 agreement effectuated a very significant change in the rights and obligations which had been established before and at the time of the divorce.

Petitioner also claims (Pet. 6–8) a conflict of the decision below with that in *Walsh* v. *Commissioner*, 183 F. 2d 803 (C.A.D.C.). At one time the Tax Court followed the view set forth in *Dauwalter* v. *Commis-*

sioner, 9 T.C. 580, cited by petitioner (Pet. 16), that Section 22(k) required that the instrument imposing the obligation to pay be incident to the divorce decree. In *Walsh* v. *Commissioner*, 11 T.C. 1093 (involving the wife), the Tax Court reiterated its earlier position and was affirmed by the Court of Appeals for the District of Columbia, with Judge Edgerton dissenting, 183 F. 2d 803. However, the Tax Court subsequently reversed its position, and, in *Walsh* v. *Commissioner*, 21 T.C. 1063 (involving the husband), declined to follow its earlier view even though it produced a different tax consequence to the husband from that of the wife. See also *Baraam* v. *Commissioner*, 19 T.C. 401; *Holahan* v. *Commissioner*, *supra*, 21 T.C. 451. We do not believe the conflict between the decision here and the decision of the court of appeals in the *Walsh case*, relying in part on the Tax Court determination in that case, is significant enough to justify certiorari in view of the subsequent change of position by the Tax Court.[1]

[1] Petitioner's quotation (Pet. 13) from the Report of the Committee on Ways and Means of the House of Representatives (p. 9), pertaining to the 1954 Internal Revenue Code, that the obligation to pay must be "imposed by a court decree or by a written agreement incident to a decree" is from the general introductory statement by the Committee. This single unexplained quotation does not warrant ascribing to the Committee, as petitioner does (Pet. 14), an interpretation which is inconsistent with the Second Circuit's interpretation here, particularly since, in the portion of the Report containing the detailed discussion, the Committee employed the same phrase found in Section 22(k): "under a written instrument incident to the divorce or separation." See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A20-A21 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4157).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
HOWARD A. HEFFRON,
Acting Assistant Attorney General.
ROBERT N. ANDERSON,
CHARLES B. E. FREEMAN,
Attorneys.

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